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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (R. 64) is not reported. The opinion of the district court upon the motion of petitioner to dismiss the indictment appears in the record at R. 28–30.

JURISDICTION

The order of the court of appeals was entered on November 4, 1960 (R. 64). A petition for a writ of certiorari was filed on November 16, 1960, and was granted on June 19, 1961 (R. 184; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether on application for leave to appeal in forma pauperis despite an adverse certificate by the trial judge the court of appeals, after it has examined legal memoranda submitted by appointed counsel on the basis of the trial transcript, could properly conclude that further proceedings in forma pauperis were not warranted.

2. Whether the court of appeals should on its own motion have concluded that objections to trial instructions to the jury, not challenged in either court, raised a non-frivolous question of plain error.

STATUTE INVOLVED

Section 1915 of Title 28 U.S.C. provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by

the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * *

STATEMENT

I. THE PROCEEDINGS UNDER REVIEW

A. THE CONVICTION

Petitioner, Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins, and Adam H. Artis were indicted in a sixteen-count indictment returned in the United States District Court for the District of Columbia (R. 2). Counts 1 and 2 charged unlawful entry into, and theft from, a pharmacy (R. 173). Counts 3 and 4 charged forging and attempting to utter a falsely made money order to Morris Gevinson. Counts 5, 6, and 7 charged forging, uttering, and causing the transportation in interstate commerce of a falsely made money order uttered to Abraham Borak. Counts 8, 9, and 10 charged the same acts in relation to a money order passed to Augustus Jackson (Pet. Br. 78–81; R. 175–179). Counts 11

through 16 alleged similar offenses (R. 2).[1] Thompkins and Artis pleaded guilty (R. 6). After a jury trial, during the course of which Alexander pleaded guilty, Tyler was acquitted and petitioner was convicted under the first ten counts (R. 6). Upon appeal, the conviction was reversed due to prejudicial newspaper publicity resulting from Thompkins' contumacious behavior in refusing to be sworn as a government witness, which his attorney claimed was caused by fear of petitioner, and the failure of the trial judge adequately to determine the effects of the newspaper articles. *Coppedge* v. *United States,* 272 F. 2d 504 (C.A.D.C.). On March 11, 1960, at the second trial, after the jury found petitioner guilty under Counts 3 through 10, concurrent sentences of 20 months to 5 years were imposed on each count (R. 180, 182–183).[2]

B. THE PROCEEDINGS ON APPEAL

On March 22, 1960, the trial judge denied an application for leave to appeal in forma pauperis, certifying the appeal as frivolous and not in good faith. Thereupon, petitioner filed, *pro se,* a petition in the court of appeals for leave to appeal in forma pauperis (R. 1–4). The court appointed counsel in his behalf (R. 5), and on June 15, 1960, his counsel

[1] All defendants were named in each count except Artis who was charged only in counts 3 through 7 (Pet. Br. 78–81). At petitioner's first trial, the court entered a judgment of acquittal upon counts 11 through 16 (R. 168).

[2] The sentence imposed after the first trial was imprisonment from 2 to 6 years. The court reduced the sentence because of the jury acquittal on the first two counts (R. 182–183).

filed a memorandum (R. 5–28) in support of the application, relying upon three contentions as involving "substantial questions". These are set forth in relation to the trial record, *infra*, pp. 15–16.

The government agreed (R. 31) that forma pauperis relief should be granted to the extent of the preparation of a transcript of the proceedings since petitioner had satisfied the requirements of *Whitt* v. *United States*, 259 F. 2d 158 (C.A.D.C.). In response, petitioner argued for immediate granting of the entire forma pauperis application, contending that the substantiality of the issues was evident without a transcript. He stated that the government's position required that the case "be brought before this Court again on the motions calendar, and orally argued before this Court and determined; and that only thereafter, the case should be briefed on the merits and orally argued on the merits and decided by this Court as an appeal." He asserted that this procedure would result in delay and cause a "fragmentation of the appellate disposition of in forma pauperis cases" (R. 33). On July 1, 1960, the court ordered that the transcript be furnished and the forma pauperis application otherwise be held in abeyance (R. 34).

After the transcript was prepared, the government filed a detailed memorandum opposing the forma pauperis application (R. 35–40). In turn, petitioner filed another memorandum based upon the transcript, urging the same "substantial questions" and two "new substantial questions", also set forth *infra*,

p. 16 (R. 40-63). A three-judge panel of the court of appeals (Chief Judge Miller and Judge Bastian, with Judge Bazelon dissenting), after considering the petition and "the memoranda in support and in opposition", denied the petition without opinion (R. 64).

II. THE ISSUES RAISED

A. THE PROCEEDINGS IN THE DISTRICT COURT

1. The evidence showed the following: In the early morning of December 2, 1957, an unlawful entry and theft at the New Fidelity Drug Store resulted in the taking of blank Nation-Wide money orders, a check-writing machine, cigarettes, and over thirteen hundred dollars in cash (R. 173–174).

In December 1957, a trunk owned by petitioner containing the proceeds of the burglary was brought to the home of Quincy and Hattie McCall by Tyler and another individual at the request of petitioner. Several times, within the next few days, petitioner removed items from the trunk (R. 174–175; see also Tr. 100–101, 137–138). In early December 1957, Adam Artis passed one of the stolen money orders (Govt. Ex. 3), completed by forgery, to Abraham Borak at the Gayety Liquor Store in the District of Columbia. Petitioner drove Artis, Alexander, and Tyler to this liquor store in an automobile. Artis had been told, in petitioner's presence, to go into the liquor store and cash the money order by informing the proprietor that it came from his uncle in Roanoke, Virginia. After Artis passed the money order, he gave the pro-

ceeds to petitioner (R. 87–89, 103–106, 177, 179; see also Tr. 267–272). Petitioner and his three companions then went to a grocery store where Artis unsuccessfully attempted to pass a second money order (Govt. Ex. 2) (R. 82–83, 107, 176). On December 3, 1957, Clarence Thompkins passed a third forged money order (Govt. Ex. 5) at a delicatessen, visiting the store with Quincy McCall. On this occasion, petitioner and Alexander were again in the automobile (R. 178–179). The two uttered money orders were transported from the District of Columbia to Maryland, where the issuing bank was located (R. 178).

2. On June 23, 1959, the court of appeals reversed petitioner's conviction following his first trial. *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.). The opinion disclosed the following:[1] On December 11, 1958, during the course of the trial, after Clarence Thompkins had refused to be sworn as a witness, his lawyer "told the court that the reason Thompkins refused to take the stand was fear. 'I sincerely and honestly believe that Clarence Thompkins is deathly afraid of Mark Coppedge. Mark Coppedge was involved in another incident involving his brother, Charles Thompkins, in which Charles Thompkins was unmercifully beat, his teeth knocked out and he was pistol whipped. Clarence Thompkins saw that happen.'" Clarence Thompkins, in an interview, had

[1] The episode is not part of the record filed in this Court but was part of the joint appendix on the first appeal (Case No. 14,985, C.A.D.C., J.A. 55–57, 60–62, 78–80).

also disclosed to government counsel that his life had been threatened by petitioner. The trial court (Judge Holtzoff) then held Thompkins in contempt. This incident was reported in the newspapers together with a statement that Coppedge was serving a prison term for assault with a deadly weapon on Charles Thompkins.' 272 F. 2d at 505. The appellate court held that the nature of the articles was such that no reasonable juror "could erase from his mind this picture of the defendant, whom they were trying for offenses which did not involve physical violence." 272 F. 2d at 508.

3. Prior to the second trial, on November 17, 1959, the petitioner filed a motion to dismiss the indictment, contending that Clarence Thompkins, who was incarcerated at Lorton Penitentiary, had perjuriously implicated the petitioner in testimony before the grand jury. Attached to the motion were (1) a November 18, 1958, statement purportedly signed by Thompkins, alleging that he gave a false statement against petitioner after being promised that housebreaking charges would be dismissed and charging further that false statements implicating petitioner in this offense were made to the grand jury upon the promise by the Assistant United States Attorney, Thomas A. Flannery, that other offenses would be dismissed against Thompkins if he entered a guilty plea; (2) a letter which Clarence Thompkins had written prior to the

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'The Court recently refused to review a collateral attack on this sentence. *Coppedge* v. *United States*, No. 211 Misc. this Term, certiorari denied, October 9, 1961.

sentencing of petitioner after the first trial, stating that he had made false statements implicating others;[5] and (3) two copies of an unsigned paper which included a charge that Thompkins' purported false statements had been prompted by F.B.I. agent Joseph Woods (R. 8–10).

On December 11, 1959, at the hearing on this motion, defense counsel made a legal argument, conceding that a "bona fide strong showing" was necessary to vitiate the indictment, and indicating that he was resting upon the statements already filed.[6] The Assistant United States Attorney, Thomas A. Flannery, took the position that the motion was insufficient because it did not allege that the indictment was secured solely on Thompkins' testimony, substantiating his statement by furnishing the court a copy of the grand jury testimony (R. 65–72).

On December 22, 1959, the court (Judge McGuire) denied this motion in a memorandum opinion, concluding that petitioner had made an insufficient showing to compel the dismissal of the indictment. It

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[5] The complete letter, which was attached to the motion, does not make it clear whether the false statements relate solely to the housebreaking charge.

[6] His remarks relative to testimony were as follows (R. 66):

"I have made available for the Court this morning, though I do not intend, unless it be necessary, to call upon them for testimony, the defendant, Mr. Coppedge, who is with us here, and also Mr. Clarence Thompkins, who is the affiant and who is the person who we allege implicated Mr. Coppedge improperly.

"I am prone, Your Honor, to rest upon the presentation made in the exhibits already in our jacket in the file."

noted that the court of appeals' opinion shed light on this "eleventh hour renouncement," that the grand jury transcript revealed sufficient competent evidence to support the indictment, and that petitioner's first conviction had not been dependent on Thompkins' testimony (R. 28–30).

When Clarence Thompkins was called as a witness by both the prosecution and the defense at the second trial, he refused to testify on the ground of self-incrimination (R. 162; see also Tr. 77–82, 298–307).

4. On December 24, 1959, petitioner filed a motion to examine the grand jury transcript, which was argued before Judge Holtzoff on January 22, 1960. In the course of defense counsel's explanation of his motion to dismiss, the following ensued (R. 74–75):

> Mr. Cohen [defense counsel]: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.
>
> The Court: I remember the episode very well. He was just terrorized by Coppedge.
>
> Mr. Cohen: If your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.
>
> The Court: He asserts—I imagine that statement was induced by Coppedge. In any event,

> you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case.

The court thereupon denied the motion (R. 75).

On March 1, 1960, after a jury was impaneled and sworn to try the case before Judge Holtzoff, the court denied defense counsel's oral request "whether or not your Honor might consider withdrawing from the case" (R. 77–78). A second request, made after the opening statements, which called the court's attention to the pretrial motion, was also denied (R. 78).

5. At the second trial, the court permitted the introduction into evidence of the first trial testimony of Adam Artis, after the jury was informed that he was unavailable as a witness due to advanced leukemia and to a mental condition (schizophrenia, paranoid type) which had developed (R. 97). The court overruled petitioner's objections based on an undated "writing" signed by Artis alleging that his prior testimony "was just not so", and the claim that, since Artis was not now subject to cross-examination, his testimony should not be received.[7] The court found

[7] The writing in part was as follows (R. 22):

"I, Adam H. Artis, after having several drinks whiskey and wine with a fellow whom I recall as Quincy, at his apartment, did leave with him (Quincy) to several places in which I was given by him (Quincy) money orders to cash. I cash one and received funds from him (Quincy) for doing so, and as I can remember I attempted to cash several more without any success. I don't quite recall where these places were that I cashed and

that the "writing" did not affect the admissibility of the trial testimony and that there was cross-examination at the first trial (R. 90–92). Assuming that the statement might be handwritten by Artis, the court, on its own motion, stated it was inclined to allow petitioner to offer it into evidence "if it is genuine" (R. 92–93). When defense counsel stated that he would like to introduce the writing, the court, upon examining the writing, retracted this ruling, commenting that it had presupposed the statement to be in one handwriting, and noting that the statement was undated and unsworn and that it did not know any circumstances concerning its preparation. The court finally ruled that counsel could have "it marked for identification" but that the writing would not be admitted "in view of the fact that it is not in his handwriting" (R. 95–97). Petitioner did not have the statement marked and did not further move to introduce it into evidence.

The defense was permitted to impeach Artis by statements made to petitioner's first trial defense counsel (R. 134–139). The court refused, however, to permit Robert L. Bush to testify to a purported conversation between Artis and petitioner in February

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attempted to cash the money orders, all of this taken place in the month of December 1957, within the District of Columbia.

"I had no connections with any of the other defendants in this case concerning the money orders from December till now and know not of what concern they are to this case.

"I, Adam Artis do solemnly swear that the foregoing statement is true to the best of my knowledge and is made for the benefit of clearing my conscience and for justice for I have just suffered a stroke."

1958, concerning the crimes involved, on the ground that any statements by petitioner would be self-serving declarations and that defense counsel, at the first trial, could have confronted Artis with such statements when he testified at that trial on December 11, 1958 (R. 142–144, 100). No offer of proof was made as to the nature of the statements although one of the questions was "whether Mr. Coppedge had anything to do with it?"

The prior testimony of Artis disclosed the following: In early December 1957, Artis became a passenger in an automobile whose other occupants were petitioner, Tyler, and Alexander. Alexander told him, in the presence of the others, that he had a check which could be cashed if Artis followed instructions. Petitioner drove the car to a liquor store where Artis cashed the check in purchasing some liquor, giving the money received to petitioner (R. 102–106). Subsequently, after Alexander completed a second money order with Artis' name, petitioner drove them to a grocery store from which Artis and Alexander fled when the proprietor telephoned to determine the validity of the money order (R. 106–107). Artis was "pretty well intoxicated" on that day (R. 113, 117, 121).

6. At the first trial, Artis had been cross-examined on the basis of a statement given to an F.B.I. agent which had been reduced to writing by the agent and had been read to Artis before his signature was affixed (R. 117–120, 26; Defendant's Exhibit 4 at the first trial). At the second trial, after the government had rested, the prosecutor, at petitioner's request, prom-

ised to obtain for the defense at least a copy of Artis' statement (from North Carolina) (R. 132). The next trial day, Monday, March 7, 1960, the prosecutor informed the court that its arrival was expected shortly (R. 133). The defense called petitioner's retained attorney at the first trial who testified that he understood from interviewing Artis that the F.B.I. agent was supposed to have made promises to Artis (R. 137).

In rebuttal, the agent testified that, in interviewing Artis on December 2, 1958, he had not promised Artis anything and that he had written in longhand the statement which Artis had signed (R. 147–149). On cross-examination, after the agent testified that he had been informed that the original long-hand statement was en route, he was cross-examined on the basis of an "exact copy" but not a carbon copy of Artis' statement. The court refused to delay the trial to await arrival of the original (R. 149–150, 154–155). Petitioner's counsel brought out that Artis had related that he entered the liquor store alone to cash the check and had returned to "Steve, Mark and Allen" in the automobile (R. 151). On redirect, the prosecutor showed that Artis had then also disclosed that "Mark" had received the change resulting from the uttering of the money order (R. 153).

7. In the course of its instructions, after the court charged the jury as to the credibility of witnesses, it told the jury that government witness Artis and defense witness Alexander were accomplices on the basis of their testimony, that the testimony of an accomplice must be scrutinized "with care and caution" but that

the law permitted a conviction on the uncorroborated testimony of an accomplice (R. 170–171). In summarizing the evidence and explaining the nature of the charge, the court said, in regard to the evidentiary dispute as to whether Coppedge or Alexander received the money, that this issue "is not too important." The jury was told that if it found petitioner was in the car and participated in causing the money orders to be presented and that if it found petitioner drove the automobile for the purpose of bringing the person to a store for the purpose of cashing the checks "if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense" (R. 179).

There were no exceptions to the court's charge (R. 180).

B. THE ISSUES RAISED IN THE COURT OF APPEALS

In appellate counsel's first request for leave to appeal in forma pauperis and for a transcript, he raised three issues which he characterized as substantial: (1) the indictment was invalid because Thompkins' grand jury testimony was perjured (R. 8–17); (2) the trial judge erred in summarily refusing to disqualify himself (R. 17–19);[8] (3) petitioner

[8] Counsel stated: "It is certainly exceptionally difficult for counsel newly appointed on appeal to assess this point without having available the written transcript of what Judge Holtzoff said on January 22, 1960, the written transcript of what occurred when the motions to disqualify were made, and indeed the written transcript of the remainder of the trial which would disclose whether any manifestations of prejudice on the part of the judge are reflected elsewhere in the written record * * *" (R. 18).

was prejudiced in connection with the use of the prior record testimony of co-defendant Artis who was unavailable at the second trial (R. 19–27).

After the transcript had been furnished to counsel and the government had opposed the motion for leave to proceed further in forma pauperis, counsel raised two new issues: (1) a request that the court reexamine its rule that a jury may convict a defendant upon the uncorroborated testimony of an accomplice (R. 54–58) and (2) an objection to the government's closing argument to which no exception had been made at the trial (R. 58–62). The challenged instruction and argument were set out in haec verba.

After his petition for certiorari and the brief in opposition were filed, petitioner, in a reply brief, raised in this Court a new issue which had not been presented to the court of appeals. Relying on *Barry* v. *United States*, 287 F. 2d 340 (C.A. D.C.), decided after the certiorari petition was filed, he contended that the instructions were deficient with regard to the element of knowledge of the falsity of the money orders, and that this alleged error should have been noted by the court below on its own motion.

SUMMARY OF ARGUMENT

I

A. Petitioner was accorded, in the court of appeals, the rights granted by 28 U.S.C. 1915, as interpreted by this Court. The trial court certified that petitioner's appeal was frivolous. In order to determine whether to set aside this certificate, the court of ap-

peals appointed counsel for petitioner and furnished him with a trial transcript. After examining the detailed memoranda submitted by appointed counsel and the government, and with the record available, a three-judge panel of the court concluded that no further briefing and argument were required.

The procedure adopted by the court of appeals was reasonable, and in accord with the mandate of this Court and with the Congressional purpose in enacting 28 U.S.C. 1915. The denial of further leave to proceed in forma pauperis was surrounded by the protections to which this Court has held an indigent entitled. The only element usually present in ordinary appellate proceedings which was absent was oral argument, and it is primarily for each court in its discretion to decide which of its cases merits oral argument. While the court did not write an opinion, the sound administration of appellate review also leaves this to the discretion of each court.

B. The determination of frivolity was made after competent counsel had been afforded an opportunity to present the issues in the light of the stenographic transcript. The court did not make its appraisal that further briefing and argument was unnecessary at a stage when such a conclusion could not be fairly made. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide if there is sufficient indication that a question

meriting review will be raised to justify a request for the grant of a transcript. At that point it is reasonable to require that the request be granted unless the frivolousness of the issue is apparent from the face of the application. However, once counsel has been appointed, a transcript obtained, and the issues briefed, the question is whether the issues have been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. At this stage, the court of appeals is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time.

C. This procedure employed by the court below does not constitute an invidious discrimination against indigent defendants. Petitioner has received as full review on the matters presented in counsel's memoranda as that to which a non-indigent would be entitled. The review was similar to the procedure which would have been utilized if the government had filed a motion for summary disposition. In following the dictates of Congress, as expressed in 28 U.S.C. 1915, the courts of appeals have discretion in the procedure adopted to uphold or set aside a frivolity certificate of the trial judge, provided that every litigant is given adequate opportunity to present his contentions and these contentions are given fair consideration by the appellate tribunal. The method employed should be left to the procedure suggested by the experience and volume of work in each circuit.

A procedure for disposing of appeals summarily is appropriate whenever the court is made aware of the frivolous nature of the appeal. That this situation arises more frequently in this class of indigent appeals than in non-indigent appeals stems from the fact that, in non-indigent cases, there is seldom the preliminary briefing and analysis necessary in indigent cases (of the present type) under 28 U.S.C. 1915. The non-indigent cases (as well as indigent appeals in which the trial court grants leave to proceed in forma pauperis) do not normally reach the appellate judges for consideration, as a court, until the stage of oral argument. The standing mechanism for disposing without oral argument of indigent cases of petitioner's type, where that is appropriate, does not represent any denial of equal justice. Rather, appellate courts should be free to expand and develop similar procedures for culling all cases which do not merit oral argument.

II

The issues raised by petitioner did not warrant further briefing and argument.

(1) The mere presentation of an unverified statement of a co-defendant that he had perjured himself before the grand jury does not warrant the dismissal of an indictment, particularly since the judge found that there was ample other evidence to support the indictment. That the government had evidence other than the testimony of the witness is shown by the fact that the challenged witness did not testify at the first trial, and there was no contention that any of the witnesses who did testify committed perjury.

(2) The oral motion to disqualify the presiding judge after the jury had been sworn was properly denied. The court's remarks merely recalled the contumacious incident involving co-defendant Thompkins at petitioner's first trial. In any event, a judicial opinion acquired from matters presented in the course of judicial proceedings affords no ground for disqualification.

(3) The trial court properly admitted into evidence the record testimony of Artis at the first trial and its rulings in connection with this prior testimony were correct:

(*a*) A purported contradictory statement of Artis was properly excluded in the absence of any showing that it was made subsequent to his testimony at the first trial, and in the absence of any effort to present such a foundation. Moreover, it is not clear that petitioner ultimately decided to introduce the writing into evidence.

(*b*) Since the court made substantially similar comments in its instructions in respect to Artis' testimony at both trials, there was no prejudice in failing to repeat verbatim its remarks at the first trial.

(*c*) The trial court did not have to delay the trial to await the arrival of an original statement made by Artis to an F.B.I. agent, produced at the first trial, where an exact but not a carbon copy had been furnished, and the F.B.I. agent was cross-examined on the basis of this copy. Petitioner's counsel could have demanded its production prior to the commencement of the second trial. The trial judge, in view

of these circumstances, acted within his discretion in not delaying the trial to await the arrival of the original statement.

(*d*) The defense, having put part of Artis' F.B.I. statement in evidence, is in no position to complain that the government introduced other portions.

(*e*) The combination of all these objections did not make Artis' first trial testimony inadmissible. Insofar as Artis' mental condition is concerned, petitioner did not contend, in accordance with the recognized standard applicable to the competency of witnesses, that Artis was unable to comprehend the obligation of an oath at the time of his first trial.

(4) A reading of the prosecutor's closing argument shows that he did not express his personal belief in the testimony. His summation made it clear that his remarks were based on the evidence in the case.

(5) The request to reexamine the settled rule on instructions as to accomplice testimony did not raise a non-frivolous issue. Since this case did not rest on the uncorroborated testimony of an accomplice and since no exceptions were made to the court's charge, such a reexamination was particularly inappropriate here.

III

Petitioner presents in this Court a new issue which was not presented to the court of appeals and was raised for the first time in his reply to the government's brief opposing certiorari. Subsequent to the filing of the petition for a writ of certiorari, in

Barry v. *United States*, 287 F. 2d 340 (C.A. D.C.), a prosecution for causing the interstate transportation of a forged check, the court below found plain error in the trial court's charge concerning the knowledge requisite where a defendant is charged with personally presenting a forged check and the evidence of knowledge of the falsity of the check was not strong. Relying on *Barry*, petitioner contends that the court of appeals should have noted plain error on its own motion in this case. Here, however, there was no claim that petitioner personally forged or uttered the stolen money orders; his complicity depended on evidence that he may have directed the cashing and that he drove the "cashers" to the place where the documents were presented. The trial judge, recognizing this, instructed the jury that petitioner could be convicted as an aider and abettor only if he knew the purpose of the trip. Thus, the jury was specifically told that to convict they must find that petitioner had knowledge of the forgery.

ARGUMENT

I

THE DENIAL OF LEAVE TO PROCEED IN FORMA PAUPERIS MET THE REQUIREMENTS OF 28 U.S.C. 1915

The trial court, pursuant to the terms of 28 U.S.C. 1915, *supra*, pp. 2–3, certified that petitioner's appeal was frivolous and not taken in good faith. Petitioner's application to the court of appeals for leave to appeal in forma pauperis thus faced, under the statute, the initial barrier of that order, and the

initial requirement of showing that the order was improper. The court of appeals, after appointing an attorney to represent petitioner, granting him a transcript at government expense, and examining extensive legal arguments made by counsel, decided that further proceedings in forma pauperis were not warranted. In effect, it found, after examining the matter in detail, that there was no reason to set aside the trial judge's certificate. The procedure it adopted to reach that conclusion, as well as the conclusion itself, represent, we think, a reasonable method for carrying out the general principles with respect to forma pauperis appeals set forth by Congress in 28 U.S.C. 1915.

That statute embodies two concepts. On the one hand, an indigent defendant is entitled to an adequate appellate review of his conviction—a right, at government expense, to present for review to an appellate court any issue not plainly frivolous. On the other hand, Congress has sought to prevent the courts from being burdened with frivolous appeals and has given district court judges the initial duty of sifting out frivolous appeals. Faced with the certificate of the trial judge that the appeal is frivolous, the Court of Appeals for the District of Columbia Circuit has adopted a procedure, followed in this case, which does secure adequate consideration to the contentions of an indigent, but does not disregard the Congressional intent that weight be given to the determination of the district judge. On the basis of the development of the issues before it, the court of appeals

could properly conclude that no further proceedings in forma pauperis were required.

A. PETITIONER HAS BEEN ACCORDED AN ADEQUATE APPELLATE REVIEW

(1) *Petitioner had the benefit of counsel, the trial record, and detailed written memoranda*

On petitioner's *pro se* motion in the court of appeals to proceed in forma pauperis despite the certificate of the trial judge, the court of appeals promptly furnished him the assistance of a competent and conscientious attorney (R. 5). Counsel prepared a detailed memorandum in support of the application for leave to prosecute an appeal in forma pauperis (R. 5–28), after examining the record in the first appeal and the documents on file, and discussing the case with trial counsel and petitioner (R. 7). The government conceded that under *Whitt* v. *United States*, 259 F. 2d 158 (C.A. D.C.), the appeal could be adequately evaluated only on the basis of a transcript (R. 31), and the court granted petitioner a transcript at government expense (R. 34). Upon receipt of the transcript, the government filed a memorandum opposing an appeal in forma pauperis (R. 35–40), and the petitioner filed another detailed memorandum (R. 40–63). Petitioner's counsel argued at length five questions which he denominated substantial.

Thus, as required by this Court, petitioner had the benefit of representation by counsel who, in the role of an advocate, with the assistance of the transcript, argued those matters which he believed warranted

the granting of leave to appeal without prepayment of costs. See *Ellis* v. *United States*, 356 U.S. 674; *Johnson* v. *United States*, 352 U.S. 565; *Johnson* v. *Zerbst*, 304 U.S. 458.

(2) *A three-judge panel of the court of appeals considered petitioner's contentions*

The court which passed upon petitioner's case was a three-judge panel of the court of appeals. That court had before it ample materials to determine whether further consideration of the case was warranted. Counsel called the attention of the court to five matters which counsel thought might merit reversal of the conviction: (1) the validity of the indictment (R. 8–17, 41–44); (2) the refusal of Judge Holtzoff to disqualify himself (R. 17–19, 44–50); (3) the alleged prejudice resulting from the prior trial testimony of Adam Artis[9] (R. 19–27, 50–54); (4) a request for reexamination of the rule that a defendant may be convicted upon uncorroborated accomplice testimony (R. 54–58); and (5) the claim that government counsel improperly vouched for the veracity of government witnesses in closing argument (R. 58–62).

The transcript and other materials, such as petitioner's memoranda and the government's opposition, enabled the court to evaluate fully the claims advanced by petitioner.[10] Counsel utilized the tran-

[9] Petitioner in the court of appeals did not claim that Artis' testimony affected each count of this concurrent sentence case.

[10] We are informed that even though, in the absence of the docketing of an appeal, the trial record is not formally before the court of appeals, in fact the entire jacket from the district court is sent to the court of appeals when a petition for leave to proceed in forma pauperis is filed in that court.

script, as well as his conversations with trial counsel and his study of the court files, to provide petitioner with a scrupulous examination of any possible error which might entitle him to a reversal of the conviction. Generally, counsel either reproduced verbatim the incident upon which he claimed error in his memoranda or argued that an examination of the transcript was not necessary. As to the indictment, he claimed that without a transcript immediate reversal was justified. He quoted the court's instructions upon accomplice testimony and the prosecutor's argument claimed to be error (R. 54, 58–61). He also quoted the writing of Artis which he would have permitted into evidence (R. 22) and the redirect examination of F.B.I. agent Darragh to which he objected R. 52–53). The issues involved in his other contentions were made manifest by his memoranda. Thus, the court had ample basis to evaluate petitioner's contentions. The denial of leave to proceed further in forma pauperis, based upon these materials, was surrounded by all the protections to which this Court has held an indigent entitled under 28 U.S.C. 1915. See *Farley* v. *United States,* 354 U.S. 521; *Johnson* v. *United States,* 352 U.S. 565; cf. *Edwards* v. *United States,* 355 U.S. 36.

(3) *Neither oral argument nor an opinion was required*

Essentially the only element usually present in ordinary appellate proceedings which was absent here was oral argument. Such an omission does not de-

prive petitioner of any constitutional right."[11] *Price* v. *Johnston*, 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station*, 337 U.S. 265. While the importance of oral argument has been recognized by both courts and advocates, its absence does not mean that a litigant had an inadequate review. The importance of argument varies from court to court. We believe that it is primarily for each court in its discretion to decide which of its cases on the docket merit oral argument.

The court also did not write an opinion, a statement of the reasons on which its judgment rests. See *Rogers* v. *Hill*, 289 U.S. 582, 587. But the sound administration of appellate review again leaves this to the discretion of the court. As Mr. Justice Stephen Field said in *Houston* v. *Williams*, 13 Cal. 24, 26:

> * * * It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing * * *.

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[11] Rule 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides that oral argument may be waived if counsel chooses and now also provides that the court may terminate oral argument if the court feels such argument is not necessary. Rule 31(a) of the court's Rules provides that there will be no oral argument on motions.

See also Rudin, *The Requirement of Written Opinions*, 18 Calif. L. Rev. 426 (1930).

B. THE COURT OF APPEALS WAS NOT REQUIRED TO CONSIDER THE APPEAL FURTHER ONCE IT WAS SATISFIED THAT THE ISSUES RAISED DID NOT REQUIRE FURTHER BRIEFING AND ORAL ARGUMENT

The determination of whether a case is frivolous or merits further argument may be difficult. Adroit counsel may make the trivial appear substantial and it is the function of the court to pierce this veil. In such an appraisal, courts will differ in the same manner as they do where the qualitative judgment is based upon a standard such as substantial or prejudicial error. The important factor is that the defendant have adequate opportunity to present his case, not whether in a particular instance the court's evaluation of the exact strength of the case is precisely accurate.

It is one thing to appraise a case as frivolous or unworthy of further consideration, when there has been no real opportunity to present the issues. A conclusion reached under such circumstances is arbitrary action. It is quite a different matter to reach that conclusion after the case has been well briefed by competent counsel who has had the benefit of a stenographic transcript.

Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide whether there is sufficient indication that a question

meriting review will be raised to justify furnishing a transcript. At that point, where the decision must to a large extent be made on the basis of potentialities, it is reasonable to construe the term "frivolous" liberally in favor of the defendant and to grant the request unless the issues be "plainly frivolous" or clearly apparent from the face of the application. Otherwise, such an appellant would not be afforded a reasonable opportunity to appeal and his right to review would be a vain one. That is the teaching of this Court's decision in *Johnson* v. *United States*, 352 U.S. 565; *Farley* v. *United States*, 354 U.S. 521; and *Ellis* v. *United States*, 356 U.S. 674.

However, once counsel has been appointed, a transcript obtained, and the issues briefed (even though preliminarily), the court of appeals is confronted with a very different situation. In actuality, the question then is—whatever terminology one employs—whether there is need for still further briefing and for oral argument, or whether the matter can be disposed of at once. It is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issue has been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. See, *e.g.*, *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190; *Sims Motor Transportation Lines, Inc.* v. *United States*, 362 U.S. 637; *Wabash Railroad Co.* v. *Commercial Transport, Inc.*, 361 U.S. 1; *Beard* v. *Ohio*, 361 U.S. 4; *Womack* v. *Ohio*, 361 U.S. 5; *Smith*

v. *United States*, 361 U.S. 13; *Harris* v. *Pennsylvania Rd. Co.*, 361 U.S. 15; *United States* v. *Haley*, 358 U.S. 644; *United States* v. *Lane Motor Company*, 344 U.S. 630.[12] At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time. Where, as here, there has been extensive briefing which reveals the insubstantiality of the claims of error (after forewarning that the appeal may be dismissed), there is no reason to require additional consideration by the court through formally docketing the appeal, receiving further briefs, and hearing oral argument.

As we show below (*infra*, pp. 37–53), we believe that, on the questions enunciated in the memoranda of petitioner's counsel in the light of the record, a non-indigent's appeal would have been subject to dismissal or summary affirmance (see, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *Brown* v. *United States*, 293 F. 2d 149 (C.A. D.C.); *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4); *United States* v. *Esters*, 161 F. Supp. 203 (W.D. Ark.); cf. *Porter* v. *United States*, 272 F. 2d 695 (C.A. 5)). Petitioner has received as full a review on the matters presented in his counsel's

[12] Rule 16(1)(c) of this Court's Rules provides that the court "will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

memorandum as a non-indigent would be entitled to under the same circumstances. His poverty has not prevented appellate determination of this case on an adequate record and after adequate presentation. *Eskridge* v. *Washington State Board of Prison Terms and Pardons*, 357 U.S. 214, 216; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708.

C. THE PROCEDURE EMPLOYED BY THE COURT BELOW DOES NOT CONSTITUTE AN INVIDIOUS DISCRIMINATION AGAINST INDIGENT DEFENDANTS

1. There is no substantial distinction between the procedure employed in this case and the procedure which would have been followed if government counsel had filed a motion to affirm or dismiss on the ground of frivolity.[12] If, after giving both sides an opportunity to state their position, the court had dismissed such an appeal, the case would stand in the same posture. If a court has a right to dismiss an appeal summarily or to affirm summarily, and has discretion to grant or deny oral argument on appeal, the issue in this case narrows down to the question whether the forma pauperis procedure in the court below invidiously deprives an indigent of the right to oral argument simply because it is an outgrowth of the determination that the court of appeals is required to make under 28 U.S.C. 1915, and no comparable determination is necessary in paid appeals.

[12] Rule 39(a), F. R. Crim. P., provides that the "appellate court may at any time entertain a motion to dismiss the appeal * * *," and courts of appeals likewise entertain, on occasion, motions for summary affirmance.

The historic concern for the rights of indigents in the courts of law, in both civil and criminal matters, has been to insure that the fact of indigency does not deprive the party of his full measure of justice. This principle has rightly moved Congress and this Court to provide the protections we have discussed. But it has also been a matter of concern that those remedies which mitigate the rigors of poverty should not also open the floodgates to frivolous and unsubstantial proceedings. The danger is obviously greater where the appellant does not pay the cost. The Congress, in allowing appeals, included the express provision that such appeals would not be granted if in bad faith or frivolous. See 45 Cong. Rec. 1532–1534, 1767 (1910); see also *Wells v. United States,* 318 U.S. 257.[14]

In following the dictates of Congress, as expressed in 28 U.S.C. 1915, the courts of appeals have discretion in the procedure used to uphold or set aside a certificate of the trial judge that an appeal is frivolous. Various alternatives are possible. The court may combine the forma pauperis determination with the case on the merits, or it may deem it more expeditious to separate the two proceedings. It may grant one or more oral arguments, or deny oral argument. It may write an opinion on the forma pauperis motion as well as in the case on the merits, or it may dispose of a case summarily. See *e.g. Brown* v. *United*

[14] See Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940); Comment, *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454 (1959); Ridge, *The Indigent Defendant, a Procedural Dilemma for the Courts*, 24 F.R.D. 241.

States, 277 F. 2d 204 (C.A. 8); *Page* v. *United States*, 272 F. 2d 816 (C.A. 8); *Tweedy* v. *United States*, 276 F. 2d 649 (C.A. 9). The method adopted should be left to the procedure suggested by the experience and volume of work in each circuit, provided that every indigent is given adequate opportunity to present his contentions and these contentions are given fair consideration by the appellate tribunal. Unless the screening process provided by Congress is to be limited solely to those questions which, from their mere statement, are seen as devoid of all merit as a matter of law or of immediately apparent fact, a court of appeals which has had issues presented to it preliminarily—on the record and with briefs of counsel—may properly decline to permit further proceedings in forma pauperis when it decides that further briefing and argument are unnecessary. This procedure should be equally applicable whether the court is made aware of the essentially frivolous nature of the appeal on a bail application, or on a motion of the appellee to affirm the judgment, or on a forma pauperis application by the appellant. [15]

[15] The various circuits have, on occasion, dismissed appeals or summarily affirmed the decision below when the insubstantiality of the appellant's claims became apparent on the court's consideration of a bail application, an application for stay of deportation pending appeal, a motion by the government to dismiss or affirm, a motion in connection with settling the record on appeal, etc. For such a reported case in the District of Columbia Circuit, see *Boomhower, Inc.* v. *American Automobile Insurance Co.*, 220 F. 2d 488, certiorari denied, 350 U.S. 833; for a recent case in which that court dismissed an appeal as frivolous on a motion for appointment of counsel, see *Lyles* v. *United States*, No. 633 Misc., this Term.

Section 1915 of Title 28 does not require a choice between giving the appellant all at the outset (the full procedure normally available on paid appeals) or nothing at all (no counsel, no transcript, no briefing). The appellate court can properly draw the line somewhere in between, at the point that appears appropriate in the particular case. For instance, although it might not be apparent, in the absence of the transcript, that there was sufficient evidence to sustain the verdict or that the trial judge gave a proper charge on some contested issue, the record of the trial (coupled with counsel's presentation of his points) might well make it manifest that the defendant had no case. In such an event, we do not believe that the appellate court would be compelled to set the case down for argument, receive and consider further briefs, and delay appellate disposition for no substantial end. Similarly, if the opposing positions on some issue of law are sufficiently set forth so that the court feels ready and able to reject the defendant's contention without further argument, there is no need and no point to permitting further proceedings. In all cases, the significant question is whether the appellate court has had the opportunity to evaluate the defendant's case on the basis of all the materials it properly needs. Once it has obtained all those materials and has determined that nothing further is necessary to help it decide, it is not required to let the defendant proceed further.

2. Petitioner accuses the court below of making invidious distinctions between this class of indigent

appeals and non-indigent appeals, because few non-indigent appeals are dismissed or summarily affirmed without oral argument.[16] First, this overlooks the lack of any practical distinction between affirming or dismissing an appeal and denying leave to proceed in forma pauperis after full elucidation of the issues. See, *e.g.*, *United States* v. *Pravato*, 282 F. 2d 587, 591 (C.A. 2); *Johnson* v. *United States*, 265 F. 2d 496 (C.A. 4). *Gilpin* v. *United States*, 252 F. 2d 685, 265 F. 2d 203, 266 F. 2d 352 (C.A. 6); *Smith* v. *United States*, 293 F. 2d 532 (C.A.D.C.); *Lancaster* v. *United States*, 293 F. 2d 519 (C.A.D.C.); *Lee* v. *United States*, 289 F. 2d 766 (C.A.D.C.). Second, petitioner overlooks the cardinal fact that in non-indigent appeals (as well as in indigent appeals in which the trial court grants leave to proceed) there is seldom preliminary briefing and analysis, as is necessary in this class of indigent cases in which the appellate court must decide whether to allow the defendant to proceed in forma pauperis. In the other groups of cases, the matter is not normally called to the judges' attention until after all the briefs on the merits have been filed and distributed;[17] even then,

[16] It should be emphasized that many forma pauperis appeals (those in which the district court grants leave to appeal) proceed in ordinary course. The problem of this case involves only those indigent appeals which the district court has found frivolous and in which the defendant then applies to the court of appeals. And even in that class the court of appeals often grants leave to proceed at the outset.

[17] Unlike this Court, the courts of appeals, whose jurisdiction is almost wholly obligatory, do not ordinarily have to decide whether to take or hear a case, and accordingly do not have the

no formal action by the court is necessary until after argument, and there is no routine procedure by which the court decides for itself whether oral argument is unnecessary. Accordingly, once the briefs are submitted, it is usually as expeditious to proceed to the oral argument. See *Young* v. *United States*, 267 F. 2d 692, 693 (C.A.D.C.). But the review actually granted the appellant in such a case is, in reality, no greater.

It is true that the government has not often moved to dismiss non-indigent appeals or for summary affirmance—because it is usually easier and just as quick to proceed in normal course, rather than to file an unusual motion to dismiss—but the fact that the government fails to take such appropriate action does not mean that an indigent is prejudiced when appropriate action is taken as to him. As this Court said in another context, a problem may be dealt with "* * * where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. This is especially so in the District of Columbia, where the courts must deal, as in the States, with the prosecution of the ordinary local types of crimes and where the workload of the court of appeals is increased by the filing of approximately one forma pauperis application per working day of each term. See *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.), dissent

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equivalent of this Court's conferences at which certiorari is granted or denied, probable jurisdiction noted, or the decision below affirmed summarily.

by Prettyman, C.J.; *Young* v. *United States*, 267 F. 2d 692 (C.A.D.C.); *Jones* v. *United States*, 266 F. 2d 924, 926 (C.A.D.C.). In this class of forma pauperis cases—indigent appeals disallowed by the trial court—there exists perforce a standing mechanism, under the statute, for culling the particular cases which should be stopped short of oral argument. Its continued and careful use does not represent any denial of equal justice, just because no similar standing mechanism exists for non-indigent cases or for indigents granted leave to appeal in forma pauperis by the trial court.

Petitioner here has had adequate review of his contentions. Despite the efforts of counsel to develop an issue of merit, the fact is that, as we show below (pp. 37–53), when examined in the light of the transcript and other materials, the issues raised are properly characterized as frivolous and unworthy of further argument. Leave to appeal in forma pauperis was therefore properly denied.

II

THE ISSUES RAISED BY PETITIONER WERE PROPERLY DETERMINED TO BE FRIVOLOUS, AFTER BRIEFING, AND DID NOT WARRANT FURTHER BRIEFING AND ARGUMENT

(1) THE FILING OF AN UNVERIFIED STATEMENT OF A CO-DEFENDANT THAT HE HAD PERJURED HIMSELF BEFORE THE GRAND JURY DOES NOT WARRANT THE DISMISSAL OF THE INDICTMENT

a. Petitioner's motion to dismiss the indictment, filed before his second trial, alleged that his co-defendant Clarence Thompkins (who had refused to be

sworn as a witness at his first trial and who refused to testify at his second trial) perjuriously implicated the petitioner in testimony before the grand jury. Petitioner supported his motion with an unverified statement and letter signed by Thompkins to that effect, and by two unsigned papers. Petitioner did not contend that only Thompkins testified before the grand jury and he did not contend that the witnesses who testified at the first trial committed perjury. In denying the motion, the district court found *inter alia* that an examination of the grand jury transcript revealed sufficient competent evidence to support the indictment (R. 29). In our view, the contention that the mere unsworn statements of Thompkins that he gave false testimony before the grand jury invalidated the indictment is frivolous in the light of the established law in this field.

Under *Costello* v. *United States*, 350 U.S. 359, *Lawn* v. *United States*, 355 U.S. 339, 349–350, and *Holt* v. *United States*, 218 U.S. 245, the district court properly held that the indictment called for trial of the charge on the merits. These cases show that, at least where there is some other evidence before the grand jury, a claim that a witness lied to the grand jury cannot lead to dismissal of the indictment. See also *United States* v. *Aviles*, 274 F. 2d 179, 190–191 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974, where the principal government witness admitted under oath at the trial that some of his grand jury testimony was false, and *Way* v. *United States*, 285 F. 2d 253 (C.A. 10), where a wit-

ness testified that he gave perjured evidence before the grand jury.

Petitioner's position would fetter the investigatory power of grand jurors by subjecting them to the constant threat that their work could be nullified (or at least reappraised) as a result of a change in a witness' story. Any indictment could be subject to invalidation upon the recantation of a single witness. The grand jury would be faced with the dilemma that the more witnesses it heard in a particular investigation of wrongdoing, the greater likelihood that a resulting indictment might be vitiated.

b. The accusation that the Assistant United States Attorney who tried the case and the F.B.I. agent who investigated it did (Pet. Br. 45) "knowingly and wilfully induce a witness to give false and perjured testimony before a grand jury" was never seriously urged. Petitioner's motion filed by his attorney below did not make that charge. This accusation was made in two unsigned statements attached to his motion. And, at neither of the two hearings which related to this motion (R. 65–75), did petitioner's counsel adopt this loose accusation by claiming, in the presence of the Assistant United States Attorney, that he or the F.B.I. agent suborned perjury. In these circumstances, it is plain that no hearing on that issue was appropriate or necessary.

(2) THE ORAL MOTION TO DISQUALIFY THE PRESIDING JUDGE WAS PROPERLY DENIED

As set forth in the Statement, *supra*, pp. 10–11, in the course of the motion to dismiss the indictment, peti-

tioner's counsel stated that the judge "may remember" Thompkins from the previous trial. The judge stated that he remembered the episode; that Thompkins was terrorized by petitioner. He also said he "imagine[d]" that Thompkins' statement as to his perjury before the grand jury was induced by petitioner. On the basis of these remarks, petitioner's counsel, after the jury had been sworn, orally suggested that the trial judge disqualify himself.

Admittedly, the motion does not meet the requirements of 28 U.S.C. 144 since there was no affidavit of personal bias accompanied by a certificate of counsel. Beyond that, however, the remarks do not show the kind of bias which would have required disqualification if an affidavit had been filed. The statute was not intended to disqualify judges solely on the basis of an opinion acquired from matters presented in the course of judicial proceedings before them. If that were so, no judge would be qualified to hear two trials of the same case. *Craven* v. *United States*, 22 F. 2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; *Ferrari* v. *United States*, 169 F. 2d 353 (C.A. 9); *Walker* v. *United States*, 116 F. 2d 458, 462 (C.A. 9); *Eisler* v. *United States*, 170 F. 2d 273 (C.A. D.C.); see also *United States* v. *Twin City Power Co. of Ga.*, 253 F. 2d 197, 204 (C.A. 5); *Barnes* v. *United States*, 241 F. 2d 252 (C.A. 9).

In this case, as indicated by the prior proceedings at petitioner's first trial as well as by the opinion of the court of appeals in reversing that conviction, there were the best of reasons for the judge to make

the inferences that he did. See *supra*, pp. 7–8. The fact that the judge expressed his opinion in response to counsel's invitation, outside of the jury's presence, does not transform a permissible inference into a manifestation of improper bias.

(3) THE TRIAL COURT'S TREATMENT OF THE PRIOR TESTIMONY OF ARTIS WAS PROPER

At petitioner's second trial, on the basis of proof that Artis was then physically and mentally incompetent to testify, the testimony of Artis at the first trial was read into evidence. *Supra*, pp. 11–14. By making a number of contentions, petitioner attempts to develop an issue out of this fact. However, his contentions, when examined, are all found to be wholly insubstantial and therefore frivolous.

(a) *A purported contradictory statement of Artis was properly excluded in the absence of any showing that it was made subsequent to his testimony at the first trial or that it was made by Artis*

Petitioner complains that an undated purported recantation by Artis was erroneously excluded as evidence. A statement of the facts indicates the fallacy of this argument.

At the second trial, when petitioner's counsel objected to the introduction of Artis' prior trial testimony on the ground that he had found a recantation by Artis, he made two statements concerning the writing. He first asserted that, at the time Artis testified at the first trial, the statement was not "in existence, was not available to defense counsel." He

then qualified this remark by saying that he did not have such knowledge, stating that he had found it in the case file received either from petitioner's former trial or from appellate counsel. The court's position was that this did not affect the admissibility of the record testimony at the first trial but that, if the writing was a statement of Artis, it would be allowed in evidence(R. 91–92).

Petitioner claimed the writing was admissible into evidence simply because it bore the signature of Artis. When the court examined the writing and saw that it was not in the handwriting of Artis, was undated and unverified, he announced that he was not going to admit such a statement under such circumstances (R. 95–96). The writing itself stated that it was made just after Artis had suffered a stroke (R. 22).

The simple answer to the question of the admissibility of the writing denominated by petitioner as a subsequent recantation is that no real effort was made to show that it was composed *subsequent* to the prior trial testimony, or indeed that it was a statement of Artis. On December 11, 1958, Artis had testified at petitioner's first trial (R. 100). But previously, on July 19, 1958, Artis had been admitted into a hospital after a cerebral vascular accident, a stroke (R. 141). Since the statement, on its face, refers to a stroke, it is reasonable to conclude that it was drafted shortly after Artis' cerebral vascular accident in July 1958, well before his first trial testimony.

In addition, the record is not clear as to whether petitioner decided ultimately to attempt to introduce the Artis writing into evidence. The issue as to the admissibility arose in the course of the government's case. At the conclusion of the argument on the point, the court stated in regard to the writing: "At the proper time, if you wish, Mr. Cohen [defense counsel], you can have it marked for identification, but I am not going to admit it, in view of the fact that it is not in his handwriting" (R. 97). Petitioner did not have the writing marked or attempt to introduce it as part of his case. The writing denied that Artis had "connections" with any of the defendants concerning the money order (R. 22). *Supra*, pp. 11–12, fn. 7. Defense testimony was to the contrary (R. 159–160). In view of this contradictory testimony, defense counsel may have concluded, as a part of his trial strategy, not to introduce Artis' writing. He may have felt that the government at this stage would have acquiesced and that showing the writing to the jury would have been detrimental to petitioner.

(b) *Since the court made substantially similar comments in respect to Artis' testimony at both trials, there was no prejudice in not repeating verbatim his remarks at the first trial*

Petitioner complains that the trial judge at the first trial gave certain instructions to the jury indicating weakness in Artis' testimony, but that such precautions were not taken at the second trial, despite petitioner's oral request that the judge repeat his comments (R. 144–145).

At the first trial, the court had instructed the jury that Artis was "somewhat confused on the witness stand", and specifically charged he was "uncertain as to whether he gave the money to Coppedge or Alexander because he seemed to waver back and forth" (R. 25).[13] The gist of these remarks was

[13] The complete statement shown by the record at the first trial was as follows: "Now, some of the testimony in this case was given by Artis, who was a co-defendant but whose case you do not have to determine. Artis is an accomplice. I am required by law to state to you that the testimony of an accomplice should be received with care and scrutinized with caution. However, after doing so, it is for you to determine whether to believe or not to believe the accomplice, and you have a right to believe him if you feel that he is telling the truth, after you have scrutinized his testimony with caution and received it with care.

"In fact, the law permits a conviction of a crime on the uncorroborated testimony of an accomplice, if the jury decides to believe the accomplice. Here, however, the government is not relying solely on the testimony of the accomplice.

"And, I might add that Artis was somewhat confused on the witness stand and you have a right to consider that in determining the weight to attach to his testimony. Now, the fifth, sixth and seventh counts of the indictment relate to another money order, which was passed, according to the government's testimony, at a store maintained by the witness Borak, a liquor store. The fifth count charges forgery of the money order, the sixth count charges that it was uttered, that is, passed to Abraham Borak, who cashed this money order. The testimony on that issue was given first by Borak, who identified Artis as the man who passed the check to him and Artis, as stated heretofore, testified that he was in a car driven by Coppedge, that Alexander was in the car and Alexander gave the check to Artis while Coppedge stopped the car to give Artis an opportunity to go into the liquor store and that afterwards, when he cashed the check, he gave the money to Coppedge. However, he was a little uncertain as to whether he gave the money to Coppedge or Alexander because he

that Artis was uncertain as to whom he gave the money, and that the jury had a right to consider that confusion in determining the weight of Artis' testimony. The charge thus minimized the effect of Artis' evidence as to the receipt of the money.

At the second trial, the court stated, in the course of summarizing the evidence and explaining the nature of the crimes charged, in regard to the Artis testimony concerning the recipient of the money obtained by Artis in cashing the money orders, that this issue "is not too important." The jury was told that if it found petitioner drove the automobile for the purpose of bringing the person to a store for the purpose of cashing the checks "if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense" (R. 179). There were no exceptions to this charge (R. 180). Though in different words and form, this instruction minimized this aspect of Artis' testimony to the same effect as the charge at the first trial."

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seemed to waver back and forth." (Case No. 14,935, C.A.D.C., J.A. 121–122).

The court below could properly take judicial notice of the record in that court of petitioner's first trial. *United States* v. *Pink*, 315 U.S. 203, 216.

[19] Petitioner also objects to statements of the court about Artis which were made at the first trial outside the presence of the jury. But this argument is also based on the erroneous premise that the instructions concerning Artis were substantially different at the two trials.

(c) *The trial court did not have to delay the trial to await the arrival of an original statement which had been produced at the first trial since a copy was furnished*

Petitioner complains of the failure to furnish him with the original, rather than a copy, of a statement given by Artis to F.B.I. Agent Darragh. The issue is simply whether the trial court had discretion not to delay the end of the trial for the arrival of the original statement from North Carolina when the original had been seen by petitioner's first trial counsel, present in court as a defense witness on the last day of trial, and the defense was given a copy of the statement.

At the first trial, Artis had been cross-examined on the basis of the original statement which he gave to the agent (R. 117–120, 26; Defendant's Exhibit 4 at the first trial). After the government rested at the second trial, government counsel promised to obtain at least a copy of this statement and petitioner did not then absolutely demand the original (R. 132). On the next and last trial day, government counsel advised the court that he expected the original statement to arrive shortly (R. 133). On that same day, petitioner's first trial attorney appeared in court as a defense witness (R. 134).

Petitioner cross-examined the last witness, F.B.I. Agent Darragh, on the basis of a copy of the statement (R. 149–153). He desired the original for further cross-examination but the court refused to delay the termination of the case to await the arrival of the original (R. 153–155). The testimony of the agent was to the effect that the copy was an exact, but not a carbon, copy. Prior to the second trial, petitioner's

counsel had a right to inspect this statement because of its status as an exhibit at the first trial and could have had it produced prior to the second trial. In view of these circumstances, the trial judge acted within his discretion in not delaying the trial to await the arrival of the original statement.

(d) *The defense, having put part of a statement into evidence, is in no position to complain that the government introduced other portions*

Petitioner further complains of evidence by F.B.I. Agent Darragh, concerning a statement to him by Artis that Artis gave the money to "Mark" (R. 153). On direct examination, the government merely elicited the fact that a statement had been given by Artis to Agent Darragh (R. 147–149). The defense cross-examined Darragh as to part of its contents, showing that Artis entered the liquor store as instructed, made a purchase, received the change from "the one hundred dollars" and returned to "Steve, Mark and Allen in the automobile" (R. 151). It was only after the defense had thus opened the door with respect to part of the contents of the statement that the questions complained of were asked on redirect examination.

(e) *The testimony of Artis was properly admitted into evidence*

Petitioner binds together all his objections to Artis' testimony with the conjecture that Artis' later mental condition (Pet. Br. 58) "might have been responsible" for Artis' original testimony, and upon that unproven assumption argues that Artis testimony at the first trial

should not have been admitted at all in the second trial.

Prior to the admission of the recorded testimony, the jury at the second trial was informed of petitioner's mental condition at the time of that trial (R. 97). Petitioner did not contend that Artis was unable to comprehend the obligation of an oath, the test applicable where a witness is sought to be disqualified because of supposed mental condition. *District of Columbia* v. *Armes*, 107 U.S. 519, 521–524; *Schneider* v. *Kelm*, 237 F. 2d 721, 727 (C.A. 8); *Shibley* v. *United States*, 237 F. 2d 327, 334 (C.A. 9). The jury was entitled to be apprised of the earlier testimony and it was for the jury to weigh its credibility.

(4) THE PROSECUTOR'S CLOSING ARGUMENT SHOWS THAT HE DID NOT EXPRESS HIS PERSONAL BELIEF IN THE TESTIMONY

Petitioner, who did not object at the trial, contends that the prosecutor, in his summation to the jury, vouched for the veracity of government witnesses (R. 155–166). An examination of the excerpts now complained of (R. 157, 160, 162–163) which, with one exception, were extensively urged upon the court of appeals below (R. 58–62), discloses a discussion by government counsel of the credibility of various witnesses indicating their consistency, lack of motivation, and demeanor while testifying. Throughout his argument government counsel made it clear that his summation was based on the testimony and evidence in the case. The government attorney did not hold himself out as a "thirteenth juror" or indicate that he had personal knowledge. From the context it is ap-

parent his words represented advocacy on the basis of the evidence, and not testimony based on personal knowledge. There was thus no error. *Lawn* v. *United States*, 355 U.S. 339, 359–360, note 15; *Thompson* v. *United States*, 272 F. 2d 919 (C.A. 5), certiorari denied, 362 U.S. 940; *Schmidt* v. *United States*, 237 F. 2d 342 (C.A. 8). That the court below was not at all impressed with this claim of error does not show that it did not review petitioner's case with an awareness of the "plain error" doctrine.

(5) THE REQUEST TO REEXAMINE THE ESTABLISHED RULE ON ACCOMPLICE TESTIMONY WAS WITHOUT ANY MERIT ON THE FACTS OF THIS CASE

Petitioner, conceding that the instruction to the jury that the testimony of accomplices need not be corroborated was in accord with the decisions of this Court and the settled rule of the District of Columbia, contends that the court below should have reexamined its rule. In the face of the established law, this contention could clearly be regarded by the court below as frivolous. If reexamination of an established principle would as a matter of course remove a case from the category of frivolous, no appeal could ever be so denominated. There is no reason why this case should call for reexamination of the settled rule. First, no request for a different instruction was made at the trial. Second, petitioner's case is not a fitting one for such reexamination. As he himself concedes, the conviction did not wholly rest upon the testimony of accomplice Artis (Pet. Brief, pp. 58–59, note 13), and it is highly unlikely

that the jury based its verdict solely on Artis' evidence even as to the incidents as to which he did testify. If this principle should be reexamined, a proper case would be a conviction which rested solely upon the uncorroborated testimony of an accomplice, and where the issue was called to the attention of the trial court.

These were the issues presented to the court of appeals. When three of them were first raised in the application by petitioner's counsel, the court properly felt that it could not make a determination without the record. However, with the record before it, as well as further briefs, the court properly reached the conclusion that no further briefing and argument were necessary to demonstrate that petitioner had absolutely no case. The best efforts of able counsel cannot inflate these contentions into issues which are other than basically frivolous.

III

THE NEW ISSUE WHICH PETITIONER NOW SEEKS TO INJECT DOES NOT JUSTIFY LEAVE TO PROCEED FURTHER ON APPEAL IN FORMA PAUPERIS

After the petition for a writ of certiorari had been filed, petitioner, in his reply to the government's brief in opposition in this Court, suggested that there was another issue in the case which merited leave to appeal in forma pauperis. His contention was based on *Barry* v. *United States*, 287 F. 2d 340 (C.A.D.C.), decided by the court below after denial of leave to appeal in forma pauperis in this case.

In the *Barry* case, the court of appeals reversed a conviction for unlawfully transporting in interstate commerce a falsely made check, finding that the trial judge failed to charge that knowledge was an element of the offense and holding that such failure was plain error. Petitioner alleges that there is a similar error in the present charge, and that, although there was no objection at the trial or suggestion of error by competent and conscientious appellate counsel who had obviously combed the record for error, the court of appeals should on its own motion have noticed this alleged error.

We think the *Barry* decision does not inject into this case a non-frivolous issue which counsel failed to note. This case is very different from *Barry*. In *Barry*, the defendant was charged with himself presenting the forged check. The court of appeals said of the evidence in that case (287 F. 2d at 342):

> The evidence of knowledge that the check was falsely made and forged was not strong. It was almost entirely circumstantial and not easily pieced together. While sufficient to create an issue for the jury, we think its lack of clarity enhanced the importance of awareness by the jury that knowledge at the time of transportation must be established beyond a reasonable doubt. Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case.

In this case, however, there was no claim that petitioner himself either forged the check or uttered it; his guilt depended on his complicity in the forging and the uttering. Recognizing this, the judge,

before he went into detail as to the elements of the offense, gave a rather full explanation of the aiding and abetting principle, saying (R. 172):

> There is another important rule of law that is applicable to this case and that you must bear in mind: If several persons act jointly, each performing a part that results in the commission of an offense, then each of them is equally guilty of the offense, as though he performed and committed the entire offense himself. For example, if a person drives an automobile to the place where the offense is committed in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense to the same extent as the person who actually committed the offense.
>
> Knowledge, of course, cannot be proven directly, because there is no way of delving into the recesses of the mind of another person. Knowledge may be inferred by the jury from circumstances, from things done, things said, and sometimes from the act itself.
>
> Another rule of law connected with this is that any person who aids or abets, as the law says, another person committing the offense, is as guilty of the offense as though he had himself committed it.

Again, after going over the evidence, the court said as to two of the three checks involved (R. 179):

> There is some dispute in the evidence as to whether, when the two checks here were cashed, whether the proceeds were handed to the defendant Coppedge, or were handed to the defendant, Alexander. Whether it is one

> or the other is not too important. If you find that Coppedge was in the car and participated in forging the money orders and in causing them to be presented for cashing, of course, the mere fact that Coppedge was there, standing alone, is not sufficient to convict him; but the fact, if it be the fact, that he was driving the car with the intention of, if it was the intention of, bringing the party to a store to which the check was to be presented for cashing, *if he knew that was the purpose of the trip,* he can be said to be an aider and abettor and a participant in the offense, if you find that to be the fact. [Emphasis added.]

There was thus no possibility that the jury could have convicted petitioner without finding that he knew that the checks were forged. Failure of trial counsel to object to the instructions and the failure of petitioner's present counsel to raise the point previously were quite justified. There was no plain error in the instructions in this respect—there was no error at all.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the court of appeals should be affirmed.

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